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No. 624

IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1966**

EARLE C. MOODY, ET AL., *Appellants,*

*v.*

RICHMOND M. FLOWERS, ET AL., *Appellees.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA

## BRIEF IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM

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# INDEX

## Subject Index


| | Page |
|---|---|
| I. The Equal Protection Clause Requires Voter Equality in Electing Members to the Houston County, Alabama, Governing Board | 1 |
| A. The Holdings and Statements of This Court Do Not Support Appellees' Contention That Voter Inequality Is Allowed in Sub-State Governmental Elections | 3 |
| II. There Is No Justification for This Court's Requiring Voter Equality in Some Sub-State Governmental Elections But Not in Alabama County Elections | 5 |
| A. There Is No Rational Basis for the Substantial Dilution of Voting Power of Appellants and the Urban Voters of Houston County | 7 |
| III. A Properly Apportioned Alabama State Legislature Does Not Afford (and Has Not Afforded) Appellants an Adequate Remedy | 8 |
| Conclusion | 9 |


## Table of Authorities

Cases:


| | |
|---|---|
| *Baker* v. *Carr*, 369 U.S. 186 | 4 |
| *Cooper* v. *Aaron*, 358 U.S. 1 | 2 |
| *Glass* v. *Hancock County Comm'n.*, 378 U.S. 558 | 3, 5 |
| *Gomillion* v. *Lightfoot*, 364 U.S. 339 | 3, 4 |
| *Martinolich* v. *Dean*, 256 F. Supp. 612 (S.D. Miss. 1966) | 5 |
| *Reynolds* v. *Sims*, 377 U.S. 533 | 3, 4, 8 |
| *Seaman* v. *Fedourich*, 16 N.Y. 2d 94, 262 N.Y.S. 2d 444 (1965) | 1 |
| *Standard Computing Scale Company* v. *Farrell*, 249 U.S. 571 | 2 |
| *Tedesco* v. *Board of Supervisors*, 399 U.S. 940 | 3, 4 |

Constitutional and Statutory Provisions:

Federal Constitution:

Page

Article XIV, Section 1 ..... 1, 4, 9

Constitution of Alabama of 1901 (Code of Ala., Tit. 1, § 1 *et seq.* 1940 (Recomp. 1958):

Section 215 ..... 6

Alabama Statutes:

Act No. 9 of the 1957 Regular Session of the Legislature of Alabama (Acts of Alabama, Reg. Sess. 1957, No. 9, pp. 30 *et seq.*, effective May 24, 1957) ..... 8

Code of Ala., Tit. 51, § 71 (1940) (Recomp. 1958) 6

Articles:

Note, *Reapportionment*, 79 Harv. L. Rev. 1226 (1966) ..... 9

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### I. The Equal Protection Clause Requires Voter Equality in Electing Members to the Houston County, Alabama, Governing Board.

The Equal Protection Clause of the Fourteenth Amendment does not distinguish between voter equality on the state and county levels of government. And no rational basis for such distinction exists. As stated in *Seaman* v. *Fedourich*, 16 N.Y. 2d 94, 262 N.Y.S. 2d 444, 449 (1965):

> "It is axiomatic that local governmental units are creations of, and exercise only those powers delegated

> to them by the state . . . and certainly if the latter may exercise its legislative powers only in a body constituted on a population basis, any general elective municipal organ to which it delegates certain of its powers must, by a parity of reasoning, be subjected to the same constitutional requirement."

As this Court well knows, a state cannot destroy or debase one's rights under the Constitution of the United States, either directly or indirectly, through the state's political subdivisions. Thus, in *Standard Computing Scale Company* v. *Farrell*, 249 U.S. 571, 577, this Court stated:

> "For the protection of the Federal Constitution applies, whatever the form in which the legislative power of the state is exerted; that is, whether it be by constitution, an act of the legislature, or an act of any subordinate instrumentality of the state exercising delegated legislative authority, like an ordinance of a municipality or an order of a commission."

Again, in *Cooper* v. *Aaron*, 358 U.S. 1, 16, 17, the Court declared:

> "The controlling legal principles are plain. The command of the Fourteenth Amendment is that no 'State' shall deny to any person within its jurisdiction the equal protection of its laws. A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. . . . Thus, the prohibitions of the Fourteenth Amendment extend to all action of the State, denying equal protection of the law; what-

> ever the agency of the State, taking the action . . . or whatever the guise in which it is taken."

In *Gomillion* v. *Lightfoot*, 364 U.S. 339, 344-46, this Court again made it emphatically clear that a state's control over its political subdivisions is subject to the restrictions imposed by the Federal Constitution. Rejecting the contention that the states enjoy absolute control over the territory of their local governmental units, the Court stated:

> "Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution.
>
> . . . . . .
>
> The opposite conclusion, urged upon us by respondents, would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of realignment of political subdivisions. 'It is inconceivable that guarantees imbedded in the Constitution of the United States may thus be manipulated out of existence.'"

A. *The Holdings and Statements of This Court Do Not Support Appellees' Contention That Voter Inequality Is Allowed in Sub-State Governmental Elections.*

The Appellees rely on three cases to support their contention that "certain recent holdings . . . and statements" of this Court indicate that voter equality is not required in municipal elections. (Mot. to Dis., pp. 3-4) These three decisions are *Reynolds* v. *Sims*, 377 U.S. 533; *Tedesco* v. *Board of Supervisors*, 399 U.S. 940; and *Glass* v. *Hancock County Comm'n*, 378 U.S. 558. None of these cases stands for the proposition urged by the Appellees.

In *Reynolds* v. *Sims, supra* at 568, this Court held that

> ". . . as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of bicameral state legislature must be apportioned on a population basis."

The language from *Reynolds* v. *Sims,* as quoted on page four of Appellees' Motion to Dismiss or Affirm, relates to the so-called "federal analogy", as applied to the states and their political subdivisions, and does not in anyway support the voter inequality position of Appellees. The fact of the matter is that the vast majority of courts requiring equal voting rights on the municipal level of government has acted on the precise authority of *Reynolds* v. *Sims.* (Jur. St., pp. 6-7, note 3)

The second case cited by Appellees is *Tedesco* v. *Board of Supervisors,* 339 U.S. 940. In *Baker* v. *Carr,* 369 U.S. 186, 235, Justice Brennan stated:

> "*Tedesco v. Board of Supervisors* . . . indicates solely that no substantial Federal question was raised by a state court's refusal to upset the districting of city council seats, especially as it was urged that there was a rational justification for the challenged districting."

At page 252, Justice Clark, concurring, stated:

> "Similarly, the Equal Protection Clause was not invoked in *Tedesco v. Board of Supervisors.*"

It must be borne in mind that the *Tedesco* Case was decided in 1950, before *Gomillion* v. *Lightfoot,* before *Baker* v. *Carr,* and before *Reynolds* v. *Sims* and the other state apportionment cases. This fact alone makes its current validity questionable. Moreover, in *Tedesco,* unlike this Appeal, the plaintiff's argument was not based on the Equal Protection

Clause. Accordingly, the *Tedesco* Case is not determinative of the issue now before this Court.

The third case relied upon by Appellees is *Glass* v. *Hancock County Comm'n*, 378 U.S. 558. In *Glass* the plaintiffs alleged that the Hancock County, Mississippi, Board of Supervisors was unconstitutionally apportioned. The Mississippi State Courts denied plaintiffs any of the relief requested for the specific reason that plaintiffs had not exhausted their statutory remedy whereby 25 per cent of the county's qualified voters could petition the county board to redistrict and reapportion. Upon the filing of such petition, an election on the redistricting and reapportioning proposition was required. In the instant Appeal no similar power of initiative or referendum is available to Appellants and the urban voters of Houston County. Therefore, this Court's dismissal of the appeal in *Glass* is not authority for its refusal to hear Appellants' Appeal.[1]

## II. There Is No Justification for This Court's Requiring Voter Equality in Some Sub-State Governmental Elections But Not in Alabama County Elections.

On page four of their Motion to Dismiss or Affirm, Appellees make the following statement:

> "Appellees point out that even if this Court determined to allow judicial intervention to compel application of 'the one-man, one-vote' principle to certain political subdivisions below the state legislative level, such action would be inappropriate for county political

[1] Recently, a three-judge Federal Court held that the Hancock County, Mississippi, Board of Supervisors was apportioned and districted in violation of the Equal Protection Clause of the Fourteenth Amendment. *Martinolich* v. *Dean*, 256 F. Supp. 612 (S.D. Miss. 1966). This is still another case *contra* to the result reached by the Majority Opinion in this Appeal and supports Appellants' position that this Court must act now to end the confusion concerning voter inequality on the municipal level of government.

subdivisions in Alabama because of the limited power of such county boards of revenue. . . ."

In their Jurisdictional Statement Appellants have enumerated the substantial powers vested in the Houston County Governing Board. (Jur. St., p. 12) In the first paragraph of his well-reasoned, dissenting opinion, District Judge Johnson states as follows (omitting footnote references):

> "These boards of revenue perform important governmental functions, and are designed to be controlled by the voters over which they have jurisidiction. The exercise of their powers, which include the important powers to levy and collect taxes, to spend for a variety of governmental and public purposes, and to establish, change, discontinue, and repair roads, materially and substantially affects the lives, property, and welfare of the citizens of Houston and Randolph Counties. Moreover, in discharging their duties, the boards are no less representative or reflective of the views of the citizens because they are smaller than the state unit. To the contrary, rather than limit the principles of *Reynolds*, as the majority opinion does, it would seem that these principles might well have their most meaningful application at the local level." (Jur. St., App. B, pp. 23-24)

Appellees attempt to characterize the power of the Houston County governing Board to levy an *ad valorem* tax on property under Section 215 of the Constitution of Alabama and under Title 51, Section 71, Code of Alabama of 1940, as being purely ministerial in nature. However, it is clear from a reading of these Constitutional and Code provisions that the all-important amount of both general and special *ad valorem* taxes which the Board is authorized to levy for the expenses of the county each year is left to the Board's

*sole discretion*, subject to a maximum rate as set by the Alabama Constitution. Also, the exercise of the tremendously important power of eminent domain, within the constitutional and statutory limits therefor, is left to the *sole discretion* of the Board.

Therefore, even if this Court should accept the "limited *versus* general power" dichotomy urged by Appellees, it is clear that the Board is possessed with sufficient powers so as to require voter equality in the election of its members. Certainly, Appellees are not contending that the Houston County governing Board is a so-called special purpose governmental unit, such as a sewer district or a school board. Such a position would be tenuous indeed and completely unfounded.

Irrespective of the powers possessed by the Board, Appellants maintain that the determinative fact in resolving the issue presented on this Appeal is that the Alabama Legislature has *statutorily required* the election of Board members. Since the Alabama Legislature requires by statute an elective—not an appointive—method of selecting the Board members, the residents of Houston County cannot be discriminated against in such election on the basis of race, religion, national origin or geography.

A. *There Is No Rational Basis for the Substantial Dilution of Voting Power of Appellants and the Urban Residents of Houston County.*

Appellees do not dispute the facts and figures contained in the Jurisdictional Statement which show the substantial debasement of voting power of Appellants and the urban voters of Houston County. Apparently, however, Appellees seek to justify this dilution of voting power by referring to a nonexistent "road district" policy of the Alabama Legislature. (Mot. to Dis., p. 5) It is obvious that this is a belated attempt to ascribe to the statutory provisions

here in question a policy which was never intended and which, even if intended, would be improper under the Fourteenth Amendment because of the total subversion of the equal population principle. *Reynolds* v. *Sims*, 377 U.S. 533, 535, 538. Act No. 9, creating the governing Board, expresses no such policy as justification for the districting of Houston County. (Jur. St., App. C, pp. 30-36)

**III. A Properly Apportioned Alabama State Legislature Does Not Afford (and Has Not Afforded) Appellants an Adequate Remedy.**

Appellees contend that Appellants have a "practical political remedy" in that the Alabama Legislature is properly apportioned, and Appellants can elect a State Legislature to effect the relief demanded. (Mot. to Dis., p. 6) Appellants have considered this contention on pages 10-12 of their Jurisdictional Statement. In addition, however, the fact that the Alabama State Legislature is properly apportioned does not of itself protect the urban voters of Houston County who are underrepresented on the governing Board. Thus, it has been stated that

> ". . . the hope that post-Reynolds state legislatures will be moved to reapportion the cities that their predecessors left malapportioned would appear to have little basis. The new legislatures may, in some cases, have a philosophical commitment to the Reynolds principle, but there is no reason to think that they will have a greater political stake in the correct apportionment of cities. Indeed, to the extent that reapportionment on the state level increases the influence of cities, it may also increase the influence of the existing power structures in those cities—structures erected on the basis of existing malapportionment. Thus state reapportionment may make the state legislatures even less likely

to reapportion municipalities according to an equal population standard." (Note, *Reapportionment*, 79 Harv. L. Rev. 1226, 1273-74)

## Conclusion

The decision reached by the lower Court in this case is manifestly opposed to the vast majority of judicial decisions involving the issue of voter equality on the municipal level of government. This fact is undisputed by Appellees. Neither the Court below nor Appellees have presented any meaningful evidence to justify the gross inequalities in voter representation which exist by virtue of the Houston County apportionment scheme. Further, Appellants contend that the Equal Protection Clause of the Fourteenth Amendment permits no justification for the substantial unequal treatment of urban voters in either state or municipal elections.

For the reasons set forth above and in the Jurisdictional Statement, Appellants submit that probable jurisdiction of the Appeal should be noted.

Respectfully submitted,

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